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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 145.

LOUISE A. WHITCOMB, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

REPLY BRIEF FOR THE PETITIONER.

CLAUDE R. BRANCH,
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December, 1933.

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Our position has been very simple. As a remainderman, petitioner is one of those who would suffer if the Commissioner's views should prevail in the construction of the will. In such event, therefore, it is clear that she should be allowed the deduction. Precisely similar was *Merle-Smith v. Commissioner,* 42 F. 2d. 837, except that it involved depletion rather than depreciation.

The Commissioner agrees with us that there should be no different rule for depreciation than for depletion.

On other phases of the case, however, the Commissioner's position is somewhat hesitant. Apparently this is due to the pendency of other cases which might be affected by any definite statement the Commissioner might make here. Or it may be he desires not to seem dogmatic in matters of California law.

Thus the Commissioner questions whether the remainder is "technically vested or not." (Res. Br. p. 3.) Though subject to divestment if the remainderman dies before she comes into possession, the remainder is vested under Sections 694 and 695 of the Civil Code of California. These Sections were based on the New York cases, and particularly upon *Williamson v. Field*, 2 Sandf. Ch. 586. That case involved limitations similar to these here, and held the remainders were vested. (See also *Moore v. Littel*, 41 N. Y. 66; *Simpson v. Kamos Realty Co.*, 166 N. E. 320; *Doctor v. Hughes*, 122 N. E. 221.)

The limitation to Harvard College is therefore an executory devise, not, as the Commissioner denominates it, a remainder (Res. Br. p. 4, note 4).

The Commissioner's citation of Section 863 of the Civil Code of California would be pertinent if the remainder interest here were of the character of an "equitable estate". The remainder, however, is a legal estate.* The estate of the trustee is the "whole estate" as long as it lasts. But it must terminate on the death of the *cestui que*

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*At the time of the will and of the decree of distribution section 857 of the Civil Code provided:

> Express trusts may be created for any of the following purposes: One. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust. Two. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. Three. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of title two of this part; or,

vie. Petitioner, then, has a two-fold interest in this property. As to the life estate she is a mere beneficiary. Section 863 might properly have been cited in that regard. As to the remainder, however, she has the vested legal estate and the code section has no application.

Archer-Shee v. Garland (1931) A. C. 212 (Res. Br. p. 4) must have been cited without having this distinction in mind. It relates to the rights of the beneficiary of a life estate. The remainder was not involved.

The Commissioner speaks loosely, therefore, when he insists that "The property * * * is * * * the property of the trust, not of the petitioner." (Res. Br. pp. 4-5.) If this means "the property of the trustee", it is clearly a mistake. The trustee only has a life estate. Petitioner owns the remainder.

This has induced the Commissioner's next error:

"Depreciation * * * was a loss falling on the trust and not upon the petitioner." (Res. Br. p. 5.)

It has been held that a life tenant can not deduct depreciation. *Kaufman v. Commissioner,* 44 F. 2d. 144. If so, only the remainderman could deduct it.

The Commissioner's argument here repudiates the statements both of the Court below in its earlier opinion and of the Circuit Court of Appeals upon which the former

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Four: To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same title.

This limited a trust of real property to the specific purposes there enumerated. These did not include a trust to convey the legal estate to remaindermen on termination of an equitable life estate.

Estate of Fair, 132 Cal. 523, 549;
Estate of Fair, 136 Cal. 79;
Estate of Sanford, 136 Cal. 97;
McCurdy v. Otto, 140 Cal. 48;
Hofsas v. Cummings, 141 Cal. 525;
Estate of Dixon, 143 Cal. 511;
Sacramento Bank v. Montgomery, 146 Cal. 745.

Section 871 of the Civil Code provided:

When estate of trustee to cease. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

The remainder, therefore, takes effect as a legal remainder and the trustee has only a life estate.

court relied in the present case (Pet. Br. pp. 4-5, Res. Br. pp. 5-6). The Commissioner insists:

> It may not be inferred from such a statement, however, that the lower courts held or intended to hold that the depreciation of trust property during the term of the trust and before the extent of the remainder interest passing to the remaindermen could be ascertained was a present loss to the remaindermen for which a deduction might be allowed in computing the taxable net income of the remainder.

But what the Circuit Court of Appeals said was precisely that:

> The loss then due to depreciation under the record in the present case is borne by remaindermen in determining the tax. (R. 159)

Finally, the Commissioner comes to *Merle-Smith v. Commissioner,* 42 F. 2d. 837, and its associated rulings (Pet. Br. pp. 3-7; Res. Br. pp. 6-7). In effect he contends that decision was wrong. He seeks to sweep away not only that case, but the numerous judicial and administrative rulings which follow it. In the *Merle-Smith* case itself, the Commissioner's original position, like his final position on the earlier cases of the remaindermen here, was in accord with what has been the administrative practice since that time. We submit that this should not be reopened.

Respectfully submitted,

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